April 24, 2008

Marcia S. Adams, Executive Director
South Carolina Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016

Dear Ms. Adams:

You seek an opinion as to whether "South Carolina Citizens for Life, Inc., aka Choose Life S.C. has met all requirements of Code Section 56-3-8000 for issuance of a license plate in its name." By way of background, you provide the following information:

> [a]s you are aware, the Legislature originally enacted 2001 Act 104, which created the "Choose Life" special license plate. This is codified in Section 56-3-8910. Before plate production could begin, Planned Parenthood of South Carolina sued the Department of Motor Vehicles, the Department of Social Services, and the Department of Corrections in federal court. The Attorney General's Office defended the three agencies but lost in district court and in Richmond in 2005. The three agencies bore the burden of paying Planned Parenthood's attorneys fees, at over $50,000 per agency.
>
> Section 56-3-8000 existed prior to Section 56-3-8910. It allowed plates to be issued to non-profit organizations but did not provide for money to go to those organizations. 56-3-8000 was amended in 2006 to provide for the sponsoring organization to collect a fee of its choice.
>
> I enclose documents that South Carolina Citizens for Life has submitted in support of its request for a specialized plate, concluding two mock-ups of proposed plates. I also enclose a copy of DMV Policy RG-504, entitled "Specialized Plates for Organizations."
>
> As you will see, South Carolina Citizens for Life has amended its articles of incorporation to also use the name "Choose Life S.C." That change was made so that the organization name on the top of the plate would be "Choose Life S.C." instead of South Carolina Citizens for Life."

> Frank "Val" Valenta, DMV General Counsel, has reviewed these documents in light of Section 56-3-8000 and Policy RG-504 and determined that South Carolina Citizens for Life is entitled to issuance of a plate that has the organization name at the tope and the organization's emblem, seal or symbol on the left side. The enclosed proposals use either "Choose Life" or "South Carolina Choose Life" at the top. Since neither of those are the name of the organization, we will inform the organization that only "Choose Life S.C." can be at the top. The proposals also show a rectangular box with either "Choose Life" or "Choose Life South Carolina." At the present time, we have no indication that either of these is a current emblem, seal, or symbol of the organization, so we will ask that the organization change that.
>
> Because the DMV and SCDC may face a suit if a plate is issued for Choose Life S.C. and because your office will probably defend the action, I request that your office issue a specific ruling on the question of whether South Carolina Citizens for Life, Inc., a/k/a Choose Life S.C., qualifies to have a specialized plate issued with "Choose Life S.C." at the top and the organization's emblem, seal, or symbol on the left side.
>
> South Carolina Citizens for Life, Inc., has been requesting for quite some time that the DMV issue a 'choose life" plate under Section 56-3-8000. Those discussions have led to the organization amending its name and to the current application. As you can appreciate, the organization is pressing the DMV for a conclusion of this matter. Therefore, I request that you issue your ruling as quickly as possible.

Law / Analysis

We begin our analysis with a discussion of the Fourth Circuit decision, *Planned Parenthood of South Carolina Incorporated v. Rose, et al.*, 361 F.3d 786 (4th Cir. 2004), referenced in your letter. There, Planned Parenthood, Inc. brought suit challenging the constitutionality of S.C. Code Ann. Section 56-3-8910, pursuant to which the General Assembly authorized the issue of "Choose Life" specialty license plates. As the Fourth Circuit noted, "[a] comparable plate with a pro-choice message is not available." The essence of plaintiff's constitutional claim was based upon the First Amendment, contending that "the statute authorizing the Choose Life plate amounts to viewpoint discrimination by the State." 361 F.3d at 787-788.

In *Planned Parenthood*, the Fourth Circuit noted that "South Carolina also has a more general statute that authorizes the issuance of specialty license plates to nonprofit organizations." See § 56-3-8000. The Fourth Circuit recognized that, pursuant to such statute,

> [a]n organization interested in obtaining a specialty plate may apply to the DPS by submitting proof of its nonprofit status along with 400 prepaid applications, or a $4000 deposit, a design for the plate, and a marketing plan for its sale that is subject to DPS approval. The plate may bear only the "emblem, a seal or other symbol" of the organization that the DPS "considers appropriate." *id*. § 56-3-8000(A), and the

> DPS has the discretion to "alter, modify or refuse to produce" any organizational plate that "it deems offensive or [that] fails to meet community standards." *id*. § 56-3-8000(H). Finally, the plate is available only to certified members of the organization.

Id. at 788.

In addition, the Court observed that Planned Parenthood "never applied to an organizational plate (one with only an emblem or symbol) under S.C. Code Ann. § 56-3-8000." Moreover, the Court noted that while legislation was introduced to allow automobile owners who wish to express a pro-choice view to purchase a plate to that effect, such bill "died in committee." Thus, according to the Court,

> [i]t does not appear that any pro-life organization initiated the idea of a Choose Life plate. Rather, the statutory provision for the plate ... came about because of the perseverance of two legislators who were acting on their own initiative.

Id. at 788-789.

After concluding that the plaintiffs possessed the necessary standing, to bring the action, the Fourth Circuit in *Planned Parenthood* addressed the First Amendment question. Three separate opinions were written by the Fourth Circuit panel – the opinion for the Court by Judge Michael, as well as concurring opinions by Judges Luttig and Gregory. Judge Michael referenced the earlier Fourth Circuit decision, *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dept. of Motor Vehicles (SCV)*, 288 F.3d 610 (4th Cir. 2002), in addressing the issue "whether the affected speech [is] ... government speech or private speech." *Id*., at 792. This made a considerable difference, because if the speech was "government" speech, the State could constitutionally engage in viewpoint discrimination. To this end, the *Planned Parenthood* Court borrowed a four factor test from other circuits which consisting of the following criteria:

> "(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech."

361 F.3d at 792-793, quoting *SCV*, 288 F.3d at 618. In applying these same factors in *SCV*, the Fourth Circuit had held that the speech in question was private speech. Thus, the restriction upon use of the emblem in that case (the Confederate Flag) constituted unconstitutional viewpoint discrimination.

Judge Michael, however, distinguished the *Planned Parenthood* situation from *SCV* as follows:

> [i]n *SCV* the Commonwealth of Virginia acted as a regulator of the existing specialty license plate forum. In response to a private organization's request for its own plate, the Commonwealth authorized, but modified the plate to prevent the display of the Confederate flag. In this case, on the other hand, the State acts as a covert speaker within the specialty license plate forum, creating a license plate that promotes one viewpoint in the abortion debate at the expense of another.

Id. at 793. In Judge Michael's view, applying the *SCV* factor to the *Planned Parenthood* case, the speech at issue "indicates that both the State and the individual vehicle owner are speaking." According to him,

> [t]he State speaks by authorizing the Choose Life plate and creating the message, all to promote the pro-life point of view; the individual speaks by displaying the Choose Life plate on her vehicle. Therefore, the speech here appears to be neither purely government speech nor purely private speech, but a mixture of the two.

Id. at 794.

Thus, having concluded that the speech in *Planned Parenthood* was "mixed," the next question in Judge Michael's analysis was "whether the State has engaged in viewpoint discrimination and whether it may engage in viewpoint discrimination when the relevant speech is both public and private." *Id*. Judge Michael concluded that South Carolina was discriminating on the basis of viewpoint because "[b]y granting access to the license plate forum only to those who share its viewpoint, South Carolina has provided pro-life supporters with an instrument for expressing their position and has distorted the specialty license plate forum in favor of one message, the pro-life message." *Id*. at 795. Moreover, in his view,

> [i]n addition to creating a limited forum for expression, the State has entered that forum as a privileged speaker. South Carolina does not merely approve or deny applications by private organizations for a specialty plate; it has favored its own position by authorizing one plate for those who share its view and by failing to authorize a comparable plate for those who oppose its view. The State thus acts as a privileged speaker within a forum that it creates and controls. The Supreme Court has never suggested that the government speech rationale allows a State to dominate a forum in this way, even one of its own creation.

Id at 798.

Judge Luttig, concurring in the judgment of the Fourth Circuit, analyzed the *Planned Parenthood* case as follows:

> [b]ased upon the reasoning and conclusions set forth in my opinion respecting the denial of rehearing *en banc* in [*SCV*], 305 F.3d 241, 244 (4th Cir. 2002), I concur in

> the judgment reached today. In *Sons of Confederate Veterans*, I outlined what I believed were the factual and doctrinal necessities for recognition that some speech acts constitute both private and government speech, notwithstanding that the Supreme Court of the United States had not at that time (and as yet has not) recognized that a single communicative event may be both private speech and government speech. *See*, *id*. at 244-47. I concluded in that case that vanity license plates are quintessentially examples of such hybrid speech. While recognizing that different circumstances may present themselves even in the single context of the unity license plate, I explained my view that at least where the private speech component is substantial and the government speech component less than compelling, viewpoint discrimination by the State is prohibited.

Id. at 800. And, Judge Gregory, also concurring the judgment, wrote that

> ... while I continue to believe that *Sons of Confederate Veterans* was wrongly decided, I am constrained to follow it because it is the law of this Circuit. Accordingly, because I believe the judgment reached today applies the factors set forth in *Sons of Confederate Veterans* in a manner that begins to recognize the government speech interests that are implicated in the vanity license plate forum, I concur in the judgment.

Id. at 801.

Since the Fourth Circuit decision in *Planned Parenthood*, the Sixth Circuit has decided a very similar case, *American Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370 (6th Cir. 2005). However, that case concluded that the "Choose Life" license plate authorized by the Tennessee Legislature constituted "government speech." Thus, there was no unconstitutional viewpoint discrimination, in violation of the First Amendment involved. The Sixth Circuit relied upon a decision of the United States Supreme Court, *Johanns v. Livestock Mktg. Assn*., 544 U.S. 550 (2005), a case decided after the Fourth Circuit's *Planned Parenthood* decision. In the Sixth Circuit's view, *Johanns* rendered the Tennessee statute constitutionally valid. The Court's analysis thus contrasted with that of the Fourth Circuit in *Planned Parenthood* in that the Sixth Circuit found the speech in question to be government speech and thus valid. The Sixth Circuit's analysis was as follows:

> [i]n *Johanns*, the Supreme Court held that federal government promotional campaigns to encourage beef consumption constituted government speech because the "message of the promotional campaigns is effectively controlled by the Federal Government itself." *Id*. at 2062. In these campaigns, however, the federal government did not explicitly credit itself as the speaker. *See id.* at 2059 (messages bore the attribution, "Funded by America's Beef Producers").

More specifically, the "message set out in the beef promotions" counted as government speech because "from beginning to end [it is] the message established by the Federal Government." *Id*. at 2062. Congress "directed the implementation of a coordinated program of promotion" that includes paid advertising to advance the "image and desirability of beef and beef products." *Id.* at 2062-63 (internal quotation marks omitted). Congress and the U.S. Secretary of Agriculture enunciated "the overarching message and some of its elements," while leaving the "remaining details to an entity whose members are answerable to the Secretary." *Id*. at 2063. Also, the "Secretary exercises final approval authority over every word used in every promotional campaign." *Id*. The Supreme Court concluded that when "the government sets the overall message to be communicated and approves every word that is disseminated," it is government speech. *Id*.

Johanns supports classifying "Choose Life" on specialty license plates as the State's own message. The Tennessee legislature chose the "Choose Life" plate's overarching message and approved every word to be disseminated. Tennessee set the overall message and the specific message when it spelled out in the statute that these plates would bear the words "Choose Life." TENN. CODE ANN. § 55-4-306. Tennessee, like the Secretary of Agriculture in *Johanns*, leaves some of the "remaining details to an entity whose members are answerable" to the State government. Tennessee delegates partial responsibility for the design of the plate to New Life, but retains a veto over its design. *See id*. § 55-4-306(b). The "Choose Life" plate must be issued in a design configuration distinctive to its category and determined by the commissioner. *Id*. § 55-4-202(b)(2). Thus, Tennessee's statutory law, and its power to withdraw authorization for any license plate, gives the State the right to wield "final approval authority over every word used" on the "Choose Life" plate. As in *Johanns*, here Tennessee "sets the overall message to be communicated and approves every word that is disseminated" on the "Choose Life" plate. It is Tennessee's own message.

Plaintiffs argue that "Choose Life" on specialty plates should be treated not as Tennessee's own message but as "mixed" speech subject to a viewpoint-neutrality requirement. Plaintiffs point to the following undisputed facts to support their view: (1) Tennessee produces over one hundred specialty plates in support of diverse groups, ideologies, activities, and colleges; (2) a private anti-abortion group, New Life, collaborates with the State to produce the "Choose Life" plate; and (3) vehicles are associated with their owners, creating the impression that a "Choose Life" license plate attached to a vehicle represents the vehicle owner's viewpoint. These facts are however consistent with the determination that "Choose Life" on a Tennessee specialty plate is a government-crafted message.

First, there is nothing implausible about the notion that Tennessee would use its license plate program to convey messages regarding over one hundred groups,

> ideologies, activities, and colleges. Government in this age is large and involved in practically every aspect of life. At least where Tennessee does not blatantly contradict itself in the messages it sends by approving such plates, there is no reason to doubt that a group's ability to secure a specialty plate amounts to state approval. It is noteworthy that Tennessee has produced plates for respectable institutions such as Penn State University but has issued no plates for groups of wide disrepute such as the Ku Klux Klan or the American Nazi Party. Plaintiffs' position implies that Tennessee must provide specialty plates for these hate groups in order for it constitutionally to provide specialty plates supporting any institution. Such an argument falls of its own weight.
>
> Second, as *Johanns* makes clear, the participation of New Life in designing the "Choose Life" logotype has little or no relevance to whether a plate expresses a government message. *See* 125 S.Ct. at 2062-63. In *Johanns* the Supreme Court upheld the beef marketing scheme as government speech even though the development of details was left to an entity "answerable" to the Secretary of Agriculture, *Id*. So long as Tennessee sets the overall message and approves its details, the message must be attributed to Tennessee for First Amendment purposes. *See id.*
>
> Third, *Johanns* also says that a government-crafted message is government speech even if the government does not explicitly credit itself as the speaker. Many of the promotional messages in *Johanns* bore the attribution "Funded by America's Beef Producers." *Id.* at 2059. The Supreme Court explained that the tagline, "standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad." *Id*. at 2065-66. This was true even though the message was presumably conveyed in private media containing mostly privately-sponsored advertising. In contrast, the medium in this case, a government-issued license plate that every reasonable person knows to be government-issued, a fortiori conveys a government message.

441 F.3d at 375-377. Rejecting the Fourth Circuit's analysis in *Planned Parenthood*, the Sixth Circuit concluded that the Tennessee specialty plate program did not create a forum for private speech, because to so conclude "would force the government to produce messages that fight against its policies, or render unconstitutional a large swath of government actions that nearly everyone would consider desirable and legitimate." 441 F.3d at 378-379. *See*, *Rust v. Sullivan*, 500 U.S. 173 (1991)

Another license plate case decided after the Fourth Circuit's *Planned Parenthood* case – *Arizona Life Coalition, Inc. v. Stanton*, 515 F.3d 956 (9th Cir. 2008) – is also instructive. There, Life Coalition, an Arizona nonprofit corporation whose goal was the promotion of adoption rather than abortion applied for a speciality plate which would "'display Life Coalition's official logo, a small

graphic of two children's faces and the motto 'Choose Life.'" The Arizona Department of Transportation determined that the Life Coalition met the requirements of Arizona law and submitted the Life Coalition's request to the Arizona License Plate Commission ("The Commission"). Members of the Commission "raised concerns over whether the general public would believe Arizona had endorsed the message of the 'Choose Life' license plate, as well as concerns over whether groups with differing viewpoints would file applications." 515 F.3d at 961.

Following the Commission's tabling of the application, Life Coalition filed a revised application, proposing the inclusion of Life Coalition's name on the plate design. Notwithstanding the fact that Life Coalition met the statutory requirements for the issuance of a speciality plate, the Commission, nevertheless, denied the application. Life Coalition then filed suit in federal District Court for violation of its First Amendment rights. The District Court denied Life Coalition's motion for summary judgment and granted the Commission's cross motion. Life Coalition appealed.

On appeal, the Ninth Circuit reversed. The analysis contained therein is very similar to the situation presented in your letter. The first question, the Ninth Circuit concluded, was whether the speech in question was government or private speech, or both. Referencing the four factors for this determination which had been utilized by the Fourth Circuit in *SCV* as well as other circuits, the Court noted that in light of *Johanns v. Livestock Marketing Assn., supra*, "[t]here is some question as to what standard we should apply in differentiating between private and government speech." 515 F.3d at 963.

However, the Ninth Circuit noted that the case before it was factually distinguishable from *Johanns*. *Johanns* "involved a government-compelled subsidy of government speech ...," while "[s]pecialty license plate programs do not raise issues regarding 'compelled-speech or a 'compelled subsidy.'" *Id*. at 964 (discussion of dissenting opinion of Judge Martin in *Bredesen, supra*). Even so, however, the Ninth Circuit deemed *Johanns* "instructive when determining whether the message constitutes government or private speech." In the Ninth Circuit's view,

> [i]n concluding that the beef program represented government speech, the Court relied on factors similar to those set forth in the four-factor test. It considered who controlled the speech, 544 U.S. at 560-61, 125 S.Ct. 2055, the purpose of the program, *id*. at 561, 125 S.Ct. 2055, and the fact that the Secretary of Agriculture exercised final editorial control over the promotional campaign, *id*. We therefore adopt the Fourth Circuit's four-factor test-supported by the Supreme Court's decision in *Johanns* – to determine whether messages conveyed through Arizona's special organization plate program constitute government or private speech.

Id. at 965.

Applying these four factors, the Ninth Circuit concluded that the "Choose Life" plates constituted private speech. In the Court's opinion, "[b]y allowing organizations to obtain specialty license plates with their logo and motto, Arizona is providing a forum in which philanthropic

organizations ... can exercise their First Amendment rights in the hopes of raising money to support their cause." *Id*. at 965. Moreover, the State exercised *de minimus* editorial control as "Life Coalition determined the substantive content of their message." *Id.* at 966. Further, citing *Wooley v. Maynard*, 430 U.S. 705 (1977), and *SCV*, the Court noted that, typically, messages conveyed through license plates implicate private speech interests "'because of the connection of any message to the driver or owner of the vehicle.'" *Id*. at 967, quoting *SCV*, 288 *supra* at 621 (discussing *Wooley*). Thus, while the plate in question had "characteristics of both private and government speech," the fact that Life Coalition depicted "the faces of two young children displayed on the license plate supporting the message 'Choose Life' ... weighs in favor of finding this to be primarily private speech." *Id*.

Finally, the Ninth Circuit Court of Appeals distinguished the situation from *Johanns* in terms of who bears ultimate responsibility for the "Choose Life" plate. In the Court's view,

> ... there is nothing in the record to even suggest that Arizona intended to adopt the message of each special organization plate as its own speech. Instead, the burden is on the non-profit organization. If it wants to convey a certain message through the Arizona speciality plate program, it must take the affirmative step of submitting an application. This suggests that it is Life Coalition, rather than the State of Arizona, that bears ultimate responsibility for the content of the speech.
>
> We therefore hold that the "Choose Life" message displayed through a speciality license plate if issued by Arizona would constitute private speech.

Id. at 968.

The Ninth Circuit, having concluded that primarily private speech was involved, proceeded then to "determine whether the Commission has acted appropriately under the First Amendment." This first entailed determining the "'nature of the forum'," i.e. whether public or nonpublic. The forum applicable in the case before it was Arizona license plates, concluded the Court. Referencing the Supreme Court decision of *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1988), the Ninth Circuit stated that a

> "Public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."

515 F.3d at 968, quoting *Cornelius*, 473 U.S. at 802. Further, if the public forum is a "limited" one – opened only to certain groups or topics – the government may restrict speech therein so long as such restrictions are "'viewpoint neutral and reasonable in light of the purpose served by the forum.'" *Id.* at 969, quoting *Diloreto v. Downey Unified School Dist. Bd. of Ed*., 196 F.3d 958, 1075 (9th Cir. 1999).

In the Ninth Circuit's opinion,, the Arizona license plate program was a limited public forum, because the purpose of the program "was to open up its license plate forum to a certain class of organizations for expressive activity." The Court summarized the Arizona program as follows:

> ... Arizona by statute restricts its specialty license plate program to only nonprofit organizations with community driven purposes that do not promote a specific religion, faith or anti-religious belief .... To gain access, the nonprofit organization must have its application reviewed and approved by the Commission.... These are not abstract policy statements, but are definite and unambiguous restrictions on gaining access to the forum ....

Id. at 970. Inasmuch as the primary purpose of the Arizona program was "aiding in vehicle identification," expression "through vanity plates (and, in turn,, special organization plates) is subject to numerous restrictions with the general public having only limited access." *Id.* at 971. Thus, "Arizona's speciality license plate programs is a limited public forum, and ... any access restriction must be viewpoint neutral and reasonable in light of the purpose served by the forum." *Id.*

In determining whether the denial of Life Coalition's application was viewpoint neutral, the Ninth Circuit rejected the Commission's assertion that "'[n]either side of the 'Choose Life' issue is being represented by a special organization plate,'" to be controlling. Such an argument, noted the Ninth Circuit, had been rejected in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), concluded the Court. In *Rosenberger*, the United States Supreme Court observed that "[i]f the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one." 515 U.S. at 831.

The Ninth Circuit concluded that Arizona had

> ... opened this forum to all organizations that serve the community and contribute to the welfare of others in a nondiscriminatory way. ... The Commission does not argue that Life Coalition failed to meet this statutory requirement. Instead, the only justification the Commission can give for denying Life Coalition's application is that it chose not to enter the Choose Life/Pro-Choice debate.

Id. at 971-972. However, such an exclusion violated the First Amendment, in the view of the Ninth Circuit. Thus, the Court of Appeals concluded:

> Arizona has created a limited public forum for non-profit organizations. The only substantive restriction is that the license plate cannot promote a specific product for sale, or a specific religion, faith, or anti-religious belief. Nowhere does the statute create objective criteria for limiting "controversial" material, and nowhere does the statute prohibit speech related to abortion .... Consequently, because abortion-related speech falls within the boundaries of Arizona's limited public forum, and because the

> Commission clearly denied the application based on the nature of the message, we conclude the Commission's actions were viewpoint discriminatory.

Id. at 972.

Moreover, in the Ninth Circuit's opinion, the Commission's action in denying Life Coalition's application "for reasons not statutorily based or related to the purpose of the limited public forum" was unreasonable. Concluded the Court,

> [t]he Commission, in fulfilling the legislature's intent to allow nonprofit organizations a means to promote their community-based cause to the public in the hopes of raising awareness and revenue, regulates access to the forum to preserve its community-based function and protect the primary function of license plates; to aid in vehicle identification. The Commission does not dispute that Life Coalition has met each of the statutory requirements. It is an organization that benefits the community without promoting the sale of the product or any religious faith, or anti religious belief. Nor does the Commission contend that Life Coalition's special organization plate will interfere with vehicle identification. In other words, it fits within the program's purpose. When an organization meets the requirements, the statute provides that "[t]he Commission *shall* authorize a special organization plate," .... By denying Life Coalition's application, although the organization and its message complied with the limited public forum's purpose as it is currently defined under Arizona law, the Commission ignored its statutory mandate and acted unreasonably in violation of the First Amendment to the United States Constitution.

Id. at 972-973.

We turn now to the issue of Section 56-3-8000 as recently amended and the requirements thereof. Section 56-3-8000 provides as follows:

> (A) The Department of Motor Vehicles may issue special motor vehicle license plates to owners of private passenger motor vehicles registered in their names which may have imprinted on the plate the emblem, a seal, or other symbol the department considers appropriate of an organization which has obtained certification pursuant to either Section 501(C)(3), 501(C)(7), or 501(C)(8) of the Federal Internal Revenue Code and maintained this certification for a period of five years. The biennial fee for this special license plate is the regular registration fee set forth in Article 5, Chapter 3 of this title plus an additional fee to be requested by the individual or organization seeking issuance of the plate. The initial fee amount requested may be changed only every five years from the first year the plate is issued. Of the additional fee collected pursuant to this section, the Comptroller General shall place sufficient funds into a special restricted account to be used by the Department of Motor Vehicles to defray the expenses of producing and administering special license plates. Any of the

remaining fee not placed in the restricted account must be distributed to an organization designated by the individual or organization seeking issuance of the license plate. The special license plate must be issued or revalidated for a biennial period which expires twenty-four months from the month it is issued.

(B) Before the department produces and distributes a plate pursuant to this section, it must receive:

> (1) four hundred or more prepaid applications for the special license plate or four thousand dollars from the individual or organization seeking issuance of the license plate; and
> (2) a plan to market the sale of the special license plate which must be approved by the department. If the individual or organization seeking issuance of the plate submits four thousand dollars, the Comptroller General shall place that money into a restricted account to be used by the department to defray the initial cost of producing the special license plate.

(C) If the department receives less than three hundred biennial applications and renewals for a particular plate authorized under this section, it shall not produce additional plates in that series. The department shall continue to issue plates of that series until the existing inventory is exhausted.

(D) License plates issued pursuant to this section shall not contain a reference to a private or public college or university in this State or use symbols, designs, or logos of these institutions without the institution's written authorization.

(E) Before a design is approved, the organization must submit to the department written authorization for the use of any copyrighted or registered logo, trademark, or design.

(F) The department may alter, modify, or refuse to produce any special license plate that it deems offensive or fails to meet community standards. If the department alters, modifies, or refuses to produce a special license plate, the organization or individual applying for the license plate may appeal the department's decision to a special joint legislative committee. This committee shall be comprised of two members from the House Education and Public Works Committee and two members from the Senate Transportation Committee.

Appointments to the joint legislative committee shall be made by the chairmen of the House Education and Public Works Committee and the Senate Transportation Committee. The department's decision may be reversed by a majority of the joint legislative committee. If the committee reverses the department's decision, the department must issue the license plate pursuant to the committee's decision.

> However, the provision contained in subitem (B) of this section also must be met. The joint legislative committee may also review all license plates issued by the department and instruct the department to cease issuing or renewing a plate it deems offensive or fails to meet community standards.

In addition, the South Carolina Department of Motor Vehicles has promulgated Policy RG-504 to "establish guidelines for the application for, approval, production and distribution of special plates for non-profit organizations seeking a special plate under SC Code of Laws § 56-3-8000 or for special plates issued pursuant to specific enabling legislation." Section II of the Policy states that

> [i]t is the intent of the Department to ensure that all designs submitted for consideration are not offensive and meet community standards of propriety. Designs displayed on state license plates are approved by the state for display to all audiences on the public highways and are the sole responsibility of the State. While the Department can be flexible in considering a range of potential specialty license plates, the public must also be protected from state action that might be construed as using taxpayer-generated funding to create messages or impressions that are not appropriate for a governmental entity.
>
> This policy is also intended to protect the Department, as a public entity acting on behalf of all citizens, from allegations that it improperly sponsored partisan messages, divisive positions, or inappropriate language or designs. To that end the Department will employ criteria published in this policy during its design review process.

Based upon the foregoing authorities, we believe that it is likely that a court would conclude that § 56-3-8000 creates a limited public forum and that the speech in question relating to the application of "Choose Life S.C." is primarily private speech. In other words, in our opinion, the situation here is closely akin to that found *Arizona Life Coalition, Inc. v. Stanton*. The reasoning in *Stanton* is based in large part upon the Fourth Circuit's analysis in the *SCV* case. For the reasons set forth below, we deem these two decisions as likely to be followed in this instance.

In our view, the situation referenced in your letter appears to be much closer to that of *SCV* and *Stanton* than to *Planned Parenthood* (Fourth Circuit) or *Bredesen* (Sixth Circuit). Based upon the explanation provided, the State, in applying § 56-3-8000, is acting more as "a regulator of the existing speciality license plate forum," as in *SCV*, than it is as a "covert speaker within the speciality license plate forum, creating a license plate that promotes one viewpoint in the abortion debate at the expense of another." *Planned Parenthood*, 361 F.3d at 793. While it is arguable that the Supreme Court decision in *Johanns* renders the speech in question to be government speech, we deem that it is more likely a court will conclude the speech to be primarily private in nature. Moreover, in our opinion, we believe the State, in enacting § 56-3-8000, has created a limited public forum for expression by nonprofit organizations, such as South Carolina Citizens for Life, or any other nonprofit organizations which complies with the terms of statute and the DMV policy.

The parameters of the limited forum established by § 56-3-8000 are clearly set forth. The organization making application for a plate must be a Section 501(c)(3) or other similar organization. The Department of Motor Vehicles must first approve the application for a plate and may "alter, modify or refuse to produce any special license plate that it deems offensive or fails to meet community standards." The plate may not "contain a reference to a private or public college or university in this State or use symbols, designs, or logos of these institutions without the institution's written authorization." The primary purpose of § 56-3-8000 remains vehicle identification.

Your letter states that the DMV General Counsel, Mr. Valenta, "has reviewed [the documents submitted in support of "Choose Life S.C."] ... and determined that South Carolina Citizens for Life is entitled to issuance of a plate that has the organization name at the top of the organization's symbol of the left side." You also indicate that, consistent with DMV policy (Policy RG-504), South Carolina DMV will require the organization to make certain changes consistent with that policy. Of course, such determination is a matter for South Carolina DMV, as the agency delegated to enforce § 56-3-8000, subject to an appellate process.

Inasmuch as we deem § 56-3-8000 to be a limited public forum, any access restrictions must be viewpoint neutral and reasonable in light of the purpose served by the forum. *Stanton, supra*. If DMV has determined that South Carolina Citizens for Life has met the requirements of § 56-3-8000, it thus may not deny, consistent with the First Amendment, the application of this organization based upon its viewpoint or for a reason unrelated to the criteria set forth in § 56-3-8000 and Policy RG-504. *SCV, supra*; *Stanton, supra.*

Conclusion

First Amendment issues are always particularly complex and difficult. Only a court and not an opinion of this Office may thus determine the requirements and limitations of the First Amendment.

However, based upon the authorities referenced herein and the facts set forth in your letter, we would advise that a court would likely conclude that the First Amendment requires that DMV issue the license plates to South Carolina Citizens for Life aka Choose Life S.C. Although the issue is complex, and it is difficult to predict how a court might rule, the situation referenced appears to be much closer to that of the Fourth Circuit's *SCV* decision and the Ninth Circuit's *Stanton* ruling than it is to the Fourth Circuit's *Planned Parenthood* case. This is not a case like *Planned Parenthood* where a "comparable plate with a pro-choice message is not available." Indeed, within the confines of the State's program, we assume any nonprofit organization meeting the requirements of § 56-3-8000 and DMV policy RG-504 may air its message through the speciality plate program. You state in your letter that Choose Life S.C. meets the requirements of § 56-3-8000 and DMV Policy RG-504 for the issuance of specialty license plates. Inasmuch as we deem § 56-3-8000 as a limited public forum along the same lines as the *Stanton* case, any access restrictions by the State must be viewpoint neutral and reasonable in light of the purpose served by the forum. *See*, *SCV*, 288

F.3d at 623 [where the restriction is not viewpoint-neutral, it is "presumptively unconstitutional in any forum."].

Accordingly, if DMV has determined that the organization, South Carolina Citizens for Life, has met the requirements for issuance of a speciality license plate imposed by 56-3-8000, the agency may not, consistent with the First Amendment, deny issuance of the speciality plates. In other words, denial may not be based upon the nonprofit organization's viewpoint, or for a reason unrelated to the criteria set forth in § 56-3-8000 and Policy RG-504. As the Fourth Circuit concluded in *SCV*, where restriction of the speech by the State is not "borne out by the statute at issue, the record before us or any rules or restrictions generally applicable to [the] ... special plate program," then, it is likely to be deemed to be viewpoint discriminatory. Thus, if these statutory and implementing policy requirements are met, the First Amendment likely requires issuance of the plates to South Carolina Citizens for Life.

Yours very truly,

Henry McMaster

HM/an